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In the

Supreme Court of the United States

No 827

LIBRADO SEDA ALVAREZ,
PETITIONER,

v.

THE PEOPLE OF PUERTO RICO,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

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In the
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No 827

LIBRADO SEDA ALVAREZ,
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v.

THE PEOPLE OF PUERTO RICO,
RESPONDENT.

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of Puerto Rico is not yet officially reported in the English language, but a translated opinion appears at pages 31-34 of Petitioner's Record Appendix in the court below—hereinafter referred to as R.A. The Per Curiam opinion of the United States Court of Appeals for the First Circuit appear in App. A of Petition.

Counter Statements of Question

I.

Whether the Supreme Court erred in holding that a police officer acting as an undercover agent may lawfully

enter the home of a citizen without a warrant in order to gather evidence against a citizen and as a part of a large scale investigation of clandestine activities—for use at a subsequent trial—if the citizen consent to such an entry by inviting the undercover agent to visit defendant's home wherein the latter engaged in the sale of Bolita numbers to the former.

II.

Whether the interpretation accorded to section 4 of Act No. 220 of 1948, and to section 448 of the Code of Criminal Procedure of Puerto Rico, by the Court below, with reference to immediate arrest, is patently erroneous or inescapably wrong and violative of the Constitutional provisions granting speedy trials in criminal cases.

III.

Whether the Supreme Court of Puerto Rico was patently erroneous or inescapably wrong in holding that the evidence offered by the prosecutions during the trial of the instant case, and admitted by the court, was primary evidence, and that even if it were to be regarded as secondary evidence, if it was admissible under the specific circumstances of the present case.

IV.

Whether the interpretation of Title 34 L.P.R.A., section 3, by the Supreme Court of Puerto Rico with reference to the verification of informations by sworn statements is patently erroneous or inescapably wrong and contravenes the due process provisions of the United States and Puerto Rican Constitutions; and whether an information

charging a misdemeanor can be set aside on the grounds that it is not duly verified.

Statement of the Case

Petitioner's Statement of the case is substantially correct. It can be complemented by the statement of facts set forth in the opinion of the Supreme Court of Puerto Rico, at pages 31-34 of the Record Appendix. We submit that there is no controversy as to the material facts of this case, since all of them are set forth exclusively in agent Hector M. Calero's sworn statements (R.A. Page 2 and 3).

Thus, we do not accept any conclusion or legal implications made by appellant in his statement of facts.

First Question Presented

From the sworn statement of police officer Hector M. Calero sole witness in this case it is shown, in its pertinent part regarding the question under discussion that:

> "That I know of my own personal knowledge, because I have seen it and have gambled on several occasions, that Librado Seda, known as Libra, is engaged in selling, collecting, carrying on his person, manipulating and keeping material related to the illegal game of Bolita, in violation of Act No. 220 of May 15, 1948.
>
> That on September 12, 1959, at about 2:30 p.m., and at his residence, No. 26 Angel Franco Street, Cabo Rojo, Puerto Rico, I bought from Mr. Seda ticket No. 935 for the amount of $1.00 for the illegal game of Bolita. That Mr. Seda entered said number in a piece of wrapping paper where he had entered other three-digit numbers followed by a dash and other numbers

to the right, all of said numbers being used in the illegal game of Bolita. That Mr. Seda did not give me the ticket number for which reason I cannot present physical evidence in this case.

That I have been entrusted a confidential mission. That I dress as a civilian at all times so as to be able to comingle with the persons in the place where I am on duty and the instructions that I have received are not to make an arrest when the law is violated in my presence but rather to obtain evidence against the greatest number of persons possible and then to submit same to the consideration of an examining magistrate."

It is admitted that said agent Calero visited petitioner's residence in some seventeen occasions and wagered one dollar on the same number 935. It is also admitted that agent Calero did not present or obtain any search warrant to enter in defendant's home.[1]

Petitioner concedes that a search and seizure is lawful if it is authorized by invitation, express or implied, of the defendant. We submit that consent to a search may consti-

[1] Petitioner filed before the trial court a motion to suppress the evidence of officer Calero based on the grounds "that said agent had invaded defendants residence, without a search warrant, and that therefore his sworn statement as to what he saw and observed there was inadmissible and its suppression should have been ordered upon being timely requested." The motion for suppression of evidence was dismissed in all the cases.

On appeal, the Supreme Court ruled that the right against illegal searches could not be invoked under the only facts presented to the trial court, that is, those appearing in the sworn statement of the undercover agent. It also decided that in case that the right against search and seizure could be invoked such right may be waived, and that the waiver is implied from defendants action in permitting the policeman to enter, or when it is established that there was an implied invitation on his part. See authorities cited by the Supreme Court of Puerto Rico. (R A page 39)

tute a waiver of the rights secured by the Fourth Amendment.[2]

Petitioner's contention is lacking of merit. The sole evidence before the trial court (Agent Calero testimony) showed that Calero visited petitioner's residence on only seventeen occasions, in all of which the dwelling petitioner engaged in illegal activities by selling bolita tickets to said agent; but the mere presence of agent Calero in petitioner's residence can not have the effect to establish, as a matter of fact, that said agent illegally entered or invaded petitioner's residence. It is more consonant with logic to suppose that, if a person visits another's residence on seventeen occasions, and once therein, the former engages in certain illegal activities with the visitor, the latter does it with full and total consent and acquiescence of the former.

The picture hereinbefore described is that of a customary ordinary infringer of the law, who converted his home in a fountain of transgressions and invited the public to enter and participate of his illegal activities.

It is worth to quote here from the case of *State v. Smith*, 87 SE 2d 593 (1955). The facts of the case present a resemblance to those considered herein. "An undercover agent visited defendant's home on two occasions. He was

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[2] Section 10 of article II of the Constitution of the Commonwealth of Puerto Rico, in its pertinent part reads as follows:

> "No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized."

Since this section of the Constitution of the Commonwealth of Puerto Rico is substantially identical to the Fourth Amendment of the Constitution of the United States, we submit that it is not necessary to consider whether the latter is applicable to Puerto Rico.

We wish to state that on two occasions the transaction of sale took place outside defendant's residence. It is clear that as to these informations, the allegations that there was an illegal search does not lie. *People v. Lopez*, 77 PRR 500 (1954); BA 33;

admitted after having knocked on the door. He asked for a drink of whiskey and defendant sold the drink without questions." (R.A. 40). It was decided that:

> "Was the evidence in this case so tainted by an illegal search as to make it inadmissable? Under C S secs. 15-27, evidence obtained by an illegal search warrant is inadmissible. But here the officer knocked and was admitted. He entered into the dwelling house neither to search nor to arrest. He went to buy whiskey which the defendant readily sold him. That he testified afterwards as to what he saw and what he bought does not make his entry unlawful. A peaceful entry by invitation does not become unlawful solely by reason of his telling the court and jury about it later. Mr. Smith of course, did not volunteer the information that he was an officer.
>
> But the defendant at no time made inquiry. All the witness did was to buy whiskey and drink it the defendant did the rest."

We claim that the fact that the special agent consummated seventeen purchases of bolita numbers in defendant's house showed that he was an invitee. *Padilla* v. *State*, 273 S.W. 2d 889 (Tex. 1954); *United States* v. *Smith*, 43 F 2d 173 (1930); *Brown* v. *State*, 18 S.W. 2d (1929).

Petitioner can not complain of the unusual fact that his invitee, an assiduous "victim" of his clandestine and illegal activities, resulted to be an undercover agent with a special service assigned. It is obvious that petitioner, subjectively mistakenly took his apparent "victim" to safely commit crime.

We submit that artifice and strategems may be employed to catch those engaged in criminal enterprises. *Sorrells* v. *United States*, 287 U. S. 435, 77 L. Ed. 413 (1932); *Trout*

v. *United States*, 284 F. 2d 268; *Collins* v. *United States*, 276 F 2d 941.

In the case of *Olmstead* v. *United States*, 277 U. S. 438, 72 L. Ed. 944 (1927) the Supreme Court of the United States declared:

> "Our general experience shows that much evidence has always been received although not obtained by conformity to the highest ethics. The history of criminal trials shows numerous cases of prosecution of unlicensed conspiracies for murder, robbery, and other crimes where officers of the law have disguised themselves and joined the organizations, taken the oaths and given themselves every appearance of active members engaged in the profession of crime for the purpose of securing evidence. Evidence secured by such means has always been received."

To the same effect see also: *Blanchard* v. *United States*, 40 F. 2d 904 (1930) certiorari denied in 282 U. S. 865; *United States* v. *Weiner*, 49 F. 2d 789 (1931).

Heretofore our discussion started from the premise that a search and seizure was carried out by government agent. This has been done only for the sake of the argument. But we submit that no search or seizure was involved in the instant case. It is uncontradicted that no evidence was seized from petitioner. It is also undisputed, or at least it appears clearly from the only evidence in this case, that agent Calero did not carry out any search in appellant's residence or in petitioner's person, nor he Agent Calero secretly observed anything aside from what he saw in hands of petitioner. This happened while petitioner was engaged in the illegal activities of selling bolita numbers to agent Calero. It is hard to conceive how under the concurring circumstances and facts of this case, peti-

tioner's right to be protected from unreasonable searches and seizures, guaranteed by the United States and Puerto Rican Constitutions, could be invoked in the courts below or before this Hon. Court.

All the cases cited by petitioner in his discussion of this question are either wholly inapplicable or clearly distinguishable from the instant case, and, in any event, we wish to indicate that the test of reasonableness of searches and seizures under the Fourth Amendment can not be stated in rigids or absolute terms, but each case must be decided on its own peculiar facts and concurring circumstances.[3] *Gio-Bart Importing Co. v. United States*, 282 U. S. 344, 357 (1931); *Harris v. United States*, 331 U. S. 145 (1947).

In relation with appellant's attacks to the procedure followed by the law enforcement officials in the present case, we are going to quote from the case of *Harris v. United States, supra*, where the Supreme Court of the United States expressed:

> "The dangers of fundamental personal rights and interests resulting from excess of law enforcement officials committed during the course of criminal investigations are not illusory. This court has been always alert to protect against such abuse. *But we should not permit our knowledge that abuses sometimes occur to give sinister coloration to procedures which are basically reasonable.* We conclude that in this case the evidence which formed the basis of petitioner's conviction was obtained without violation of petitioner's right under the constitution." (Italic ours)

[3] In any event, the government proved, prima facie, that no search and seizure was carried out in the instant case, and that, if such search and seizure was carried out, it was consented by petitioner.

Second Question Presented

In the instant case, Hector M. Calero, an undercover agent entrusted with a confidential mission, bought from defendant "bolita" numbers to be used in the illegal game of "bolita" Defendant entered said number in a piece of wrapping paper where he had entered other three digit numbers followed by a dash and other numbers to the right, all of said numbers being used in the illegal game of bolita. Defendant did not deliver any numbered tickets to agent Calero, for which reason no physical evidence was presented in evidence in this case. Agent Calero had received instructions not to arrest any person involved in any violation of the law committed in his presence, since the obvious purpose of his confidential mission was to obtain evidence against the greatest number of persons possible. It is also obvious that the postponement of detentions and arrests was imperative, or, otherwise, the large scale investigation on clandestine activities would have been impaired.

We do not deny that the government agent did not arrest defendant at the time of the commission of the offense, notwithstanding the fact that the violations were committed in the presence of said agent.

Before the trial court petitioner filed a motion to dismiss the informations based on the following grounds:

> "That the information should be dismissed because otherwise the defendant would be deprived of his constitutional right to a speedy trial, since the term provided by subdivision 1 of section 448 of the Code of Criminal Procedure of Puerto Rico has already expired counted from the time the defendant, according to the allegation was held to answer until the filing of the information, in the light of the provisions of

section 4 of Act No. 220 of 1948 which require the immediate arrest of the offenders; it being improper to leave the constitutional right of the defendant to the caprice, whim, design or convenience of the officers of The People who acted in disobedience and contempt of the mandate of said Act." (R. A. page 4)

Section 4 of Act 220 of May 15, 1948, in its pertinent part provides:

"Any person caught carrying or transporting or who has in his possession for any reason any papeleta, billete, ticket, notebook, list of numbers or letters, slips, or implements which can be used for the unlawful games of bolita, bolipool, combinations connected with the pools or bancas of the race tracks of Puerto Rico, and clandestine lotteries, and any person who possesses, sells, or in any way transports these or any other similar ones which may be utilized or used in said unlawful games or connected with the practice thereof, shall be guilty of a public offense and shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information."

Section 448 of the Code of Criminal Procedure (34 L.P.R.A. sec. 1631), subdivision 1, reads as follows:

"Section 448 provides: 'The court, unless good cause to the contrary is shown shall order the prosecution to be dismissed in the following cases:

'1. Where a person has been held to answer for a public offense, if an information is not filed against him within sixty days thereafter;' ".

On appeal, the Supreme Court of Puerto Rico decided that, "The second ground adduced was decided against appellant in *People v. Superior Court*, 81 D.P.R. 445, 449 (1959), where we clearly said, after making a careful study on the matter, that the 'starting point for the sixty day term (it refers to section 448 of the Code of Criminal Procedure) must be the act of the third person, prior to the filing of the information, known to the person concerned, and which must have the legal effect of compelling that person to answer for a public offense'. Again we ratify that the sixty-day period begins to run from the date of the arrest or detention of the person for the commission of a public offense and not from the date of the occurrence of the offense." (R.A. 36)

The Court also stated that "This situation is not altered by the provisions contained in sec. 4 of Act No. 220 of 1948 supra, to the effect that 'any person who . . . sells (list of numbers or letters, slips, or implements which can be used for the unlawful games of bolita) . . . shall be guilty of a public offense and shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information . . .' The doctrine that the defendant seeks to establish on the basis of the language cited from the statute has rather a grammatical than a legal force."

We submit that the ruling of the Supreme Court of Puerto Rico involves exclusively the interpretation of a local statute and that petitioner has not shown that the holding of the court below is patently erroneous or inescapably wrong.

"Immediately" is a term of relative significance. It never attempts to determine an exact period of time, and is generally used with more or less latitude, depending upon the particular subject in question. When an act is

required to be performed immediately, it implies a reasonable time, and taking consideration of all the peculiar circumstances of each case. It has also been construed as to mean that the act is to be performed as spon as possible, or within a reasonable time. Of course, what is a reasonable time must be determined from the facts of the particular case. The significance of this word depends largely on the context of the statute, and in legal proceedings, it does not purport to exclude any specific period of time. It it not necessarily construed to mean, either, that it is the equivalent of "instantaneous". See *Words and Phrases*, Vol 20, pages 150-183, *Balantine Law Dictionary with Pronunciations*, 1948 ed. page 608. See also the case of *United States* v. *Bell*, 48 F. Supp. 986 (Cited by Petitioner).

The word "immediately" as used in section 4 of Act 220 of May 15, 1948, is not to be given a restrictive or mandatory meaning. Nor should it be accorded the strict and literal construction that petitioner proposes. It would be absurd to attribute to the legislature the purpose of inoculating the law with the germ that would bring its destruction.

It must be remembered that, "the undercover man is a necessary weapon for investigating certain offenses which because of their essential clandestine character would remain unpunished if said method were not used." (R.A. 41). It is utterly clear that an immediate arrest in the instant case could have frustrated the large scale investigation in which clandestine atcivities concerning the illegal game of "Bolita" were involved.

The Supreme Court of Puerto Rico has taken judicial notice that the operation of Bolita game in Puerto Rico is a serious evil, a game in which racketeers prey on our poor classes and that "Act No. 220 represents a laudable attempt to deal effectively with these illicit activities." *People v. Mantilla*, 71 P.R.R. 35 (1950). To the same effect

see *Romero* v. *People of Puerto Rico*, 182 F. 2d 864 (1950) where the Hon. Court of Appeals for the First Circuit stated: "Section 4 of the Bolita Act is one section of number of related provisions dealing comprehensively with a long-recognized evil in Puerto Rico.".

So far as the constitutional question raised by petitioner is concerned, we contend that they are devoid of merits. Petitioner alleges that he was deprived of his constitutional right to a speedy trial.

The Supreme Court of Puerto Rico has decided in the case of *People* v. *Superior Court*, 81 P.R.R. 445, 58 (1959) that:

> "In the states of the Union it is absolutely required that the person be 'held to answer' or committed by order of a magistrate so that the term fixed by law for filing the information be put into effect. The American Law Institute, Code of Criminal Procedure (1930) pp. 311-16, 888-90; Annotation, The Right to a Speedy Criminal Trial, 57 Col. L. Rev. 846, 847-850 (1957). After an exhaustive research we have been unable to find a single constitutional or statutory provision or a single judicial interpretation requiring the limitation period to start before one of those official actions has taken place. *On the contrary, the accepted rule is that 'in no event will the right to speedy trial arise before there is some charge or arrest, even though the prosecuting authorities had knowledge of the offense long before this.'* The Right to a Speedy Criminal Trial, supra, p. 848; Annotation; Justice Overdue, Speedy Trial for the Potential Defendant, 5 Stan. L. Rev. 95, 99-100 (1952); People v. Jordan, 290 P. 2d 484, 491 (Cal. 1955); People v. Hildebrandt, 129 N.Y.S. 2d 48, 50 (1954) revoked for other reasons in 126 N.E.

2d 377 (C.A.N.Y., 1955); cf. Taylor v. United States, 238 F.2d 259, 262 (D.C. Cir. 1956). The Code of Criminal Procedure of the American Law Institute which undoubtedly sums up the best American experience recommends in sec. 292 that the time be computed when a person is 'committed to custody'." (Italic ours)

It should be observed that petitioner was not "held to answer" until the moment in which he was arrested or detained in connection with the commission of the offense charged, and that it is clear that the informations were filed within the period of 60 days prescribed by article 448 of the Code of Criminal Procedure. There is no room for doubt either that the informations were filed within the period prescribed by the statute of limitations for misdemeanors. See 33 L.P.R.A. sec. 253.[4]

With reference to this matter the above quoted case of *People v. Superior Court*, says at page 459:

> "The foregoing proves that the letter and history of the precept, the unanimous and consistent view of this Court, and the uniform experience of the states of the Union are in open contradiction with the interpretation proposed by the defendant. There are other cogent reasons which convince us that that interpretation must be overruled. It would tend, in situations similar to this one, to cause a regrettable confusion between the 60-day limitation period of sec. 448 and the statute of limitations for crimes established by other sections of the Code. 33 L.P.R.A. secs. 231-34. Taylor v. United States, supra at 262."

[4] It is particularly interesting to note that this statutory provisions are legislative concretions of the constitutional rights to a speedy trial and that similar statutes have been enacted in a great number of states to serve identical purposes.

Petitioner's contention is weakened if we consider the basic purpose of the right to a speedy trial in criminal cases. Again we rather quote from the case of *People v. Superior Court*, supra, page 460:

> "On the other hand it should be observed that the advantage of the citizen would be, with only one exception, remote and speculative. The constitutional right to a speedy trial and the legislative corrections of it, like our aforementioned Sec. 448, have three basic purposes: to avoid long imprisonment while the trial is pending; to eliminate personal anxiety, public suspicion and the economic and moral harm produced by a criminal accusation kept unsettled for a long period of time; to initiate the trials while the evidence is disposable, in other words, to avoid, due to the delay, the loss of witnesses and the dulling of their memory. People v. Prosser, 130 N.E. 2d 893 (N.Y. 1955); Ex Parte Trull, 298 Pac. 775, 777 (Kan. 1931); United States v. Hemming, 15 F.2d 760 (9th Cir., 1926). It is obvious that the first two propositions have no bearing on the circumstances of this case nor do they support intervenor's motion. *Nor should we presume that the fact that a peace officer fails to arrest a person while committing an offense in his presence necessarily damages defendant's defense.*

It seems unnecessary to say that nothing in this opinion should be interpreted in the sense that we are trying to bar a judicial remedy for a really extraordinary situation in which it is proved that deliberately and inexcusably or as a result of serious neglect, and after proof of all the elements of the crime has been obtained, the arrest of a person or the filing of an information against him has been postponed for the purpose of obstructing the defense, or

> of creating a climate of antagonistic public opinion against defendant, or of disturbing his peace by means of continuous persecution or ignominious investigation, all in violation of his right to a speedy, fair and just trial. Undoubtedly, such an extraordinary case in the judicial system of Puerto Rico, given the recognized probity of our officials, must require further analysis of our consitiutional and statutory provisions. (Cases omitted) The existence of that possibility, rather logical than practical, cannot, however, impel us to set aside a rule that has governed our proceedings for almost six decades and which has succeeded in keeping in this area the difficult but indispensable balance between the interest to protect public security and that of safeguarding individual liberty." (Italic ours)

Petitioner has not attempted to show that failure to immediately file the information deprived him from presenting witnesses in his defense, or that it was done as a part or deliberate plan to obtain the imposition of sentences to be served consecutively instead of concurrently, since "from the point of view of the sentence imposed, it did not cause him any unreasonable prejudice since the sentences are to be served concurrently." (R.A. page 37)

"Moreover, it cannot be said that the term elapsed between the date of the first violation—May 18, 1959—and the filing of the information—December 18, 1959—has placed the appellant in an indefensible position or that it disturbed his peace by means of continuous persecution or ignominious investigation." (R.A. page 37)

It must be observed that petitioner relies exclusively on conjectures and speculations to support his contention. The grounds adduced by him to seek the reversal of the Supreme Court holding in this matter, lies mainly in two

circumstances, to wit: First, that he was not arrested immediately after the commission of the offense charged. Second, that some time had elapsed from the commission of the offense to the filing of the informations. It has been already demonstrated that these two factors are insufficient, without more, to vulnerate petitioner's right to a speedy trial.

Petitioner urges that Penal Laws must be construed strictly. But he seems to forget that: "The rule often announced, that criminal statutes must be strictly construed does not require that the words of an enactment be given their narrowest meaning or that the lawmaker's evident intent be disregarded." *United States* v. *Gilks*, 300 U.S. 41, 48; *Singer* v. *United States*, 323 U.S. 338, 341-2; *People* v. *Mantilla*, 71 P.R.R. 35 (1950). "Whether a particular trial is speedy enough depends, of course, upon all the circumstances. Nor is speed an end in itself since justice both to the accused and to the public is the prime consideration."

Third Question Presented

We pass now to consider whether the testimony of the government witness Agent Calero constitutes primary or secondary evidence and whether assuming it to be secondary if it was admissible under the specific concurring circumstances of the instant case.

Petitioner contends that the Supreme Court of Puerto Rico erred in holding that the trial court was correct in admitting the testimony of policeman Calero to prove that the accused had in his possession or control papers or lists with numbers used in connection with the illegal game of "bolita", because same constituted secondary evidence. He insists that the best evidence were the lists or tickets

themselves and they should have been produced and offered in evidence.

But it was clearly shown by the testimony of said agent Calero that the lists or slips of papers in question were not in the possession of the prosecuting attorney because the police did not attempt to occupy same in order to avoid frustrating large scale investigation there in effect and in which special secret agents were engaged.[5]

It is evident that the trial court applied the rule expounded in Wharton's Criminal Evidence, Vol 2, sec. 594 p. 481:

> "Documents in possession of adverse party. Since the defendant in a criminal case cannot be made to give incriminating evidence against himself, and is not obliged to respond to a notice to produce an incriminatory document, shown prima facie to be in his posses-

[5] At pages 22 and 23 of the Record Appendix appear the following remarks by the trial court

> "Hon. Judge: The defense only omits the ground the Court has for not applying the rule.
>
> Mr. Galib: Well, Your Honor knows that the defendant has the constitutional right of not incriminating himself. Therefore, he could not be forced to deliver the lists.
>
> Hon. Judge: No, no. As to the rule of negligence invoked.
>
> Mr. Galib: The aggravating circumstance is that the undercover man did not make an immediate arrest because then, as he alleges, the agreed plan would be destroyed.
>
> Hon. Judge: That is why he could not be arrested immediately, so that the scheme planned could be pursued, in order to discover the greatest possible number of offenders, and the evidence, the lists, could not be seized. The defense shall remember that that was the reason.
>
> Mr. Galib: Yes, Your Honor.
>
> Hon. Judge: And that did not imply negligence nor any deliberate intention to prejudice the interests of the defendant in each case, but rather to carry out, to execute, the only effective plan or effective means, in order to be able to fight the Bolita in Puerto Rico, particularly in this district."

> sion, it is generally held that secondary evidence of the document is admissible without a notice to produce the original. In fact, it has even been held that under some circumstances it is prejudicial error to demand the production of such a document from the defendant in the presence of the jury."

In reaching the same result the Supreme Court of Puerto Rico expressed that:

> "Even if the rule of best evidence were applicable, the prosecuting attorney would have been justified in using the sworn statement of the officer, since the defendant could not have been compelled to deliver any incriminatory evidence in his possession. *Heartsill v. State*, 341 P. 2d 625 (Okla. 1959); *Commonwealth v. Montanero*, 96 A. 2d 178 (Pa. 1953); *Admissibility of Secondary Evidence of Incriminatory Document in Possession of Defendant*, 67 A.L.R. 77 (1930)."

See also *Lisansky v. United States*, 31 F.2d 846 (1929); *People v. Chapman*, 203 P. 126 (1921); *People v. Powell*, 236 P. 311. (R.A. page 42).

It is obvious that any attempt of the prosecuting attorney to compel appellant to produce said list and tickets would have consituted a violation of the constitutional rights of the accused against self-incrimination.

We submit further, that in spite of the fact that the above referred evidence was clearly admissible even if it were secondary, petitioners contentions must also fail because said evidence does constitute primary evidence.

What the prosecution attempted to prove was the existence and the nature of the lists or slips of paper and their characteristics—in possession of petitioner at the time of the alleged offense, and not the specific contents of the

same. Such fact may be established, like any other fact, by the testimony of only one credible witness, who has personally seen and observed the thing about which he testifies.[6]

This is specially true if the witness possesses special qualifications, through training and experience, to accurately judge and describe the thing or object in question.

This applicable doctrine appears in Wharton's Supra, sec. 607, page 501:

> "Parol evidence equally primary with writing When the fact as to which evidence is sought to be adduced is one that may have been observed by a witness, then his testimony regarding what he has seen or heard is primary evidence, regardless of whether such fact is reduced to writing and incorporated in a record or document because the witness testifies, not as to what the writing contains, but as to what he observed."

Respecting this, the court below decided that "In order to prove the offense, the prosecuting attorney need only establish that a sale was made and for this the sworn statement of the officer is sufficient. On the other hand, the latter's testimony is not directed to prove the specific contents of the list or tickets, but merely that the transaction involved a list or ticket of those generally used in the bolita game." (R.A.-41)

A fair reading of section 4 is sufficient to fade away any doubt about what acts are prohibited, and what offenses are established therein. It is unquestionable that the provisions of said section punish the sale of bolita tickets

[6] 32 L.P.R.A. sec. 1661
"Sufficiency of direct evidence of one witness."
"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason. Code Civil Proc., 1933, sec. 380, 32 L.P.R.A., sec. 1661."

and numbers. As may be seen, section 4 establishes several modalities of violations thereto. The government witness testified that "I brought from Mr. Sola tickets No. 935 for the amount of $1.00 for the illegal game of bolita." (R.A. 2)

Undoubtedly, this means that petitioner sold number 935 to agent Calero. Agent Calero was both a witness and a party to this transaction, and it cannot be seriously argued that his testimony about same constitute secondary evidence.

The case of *Marcus v. Search Warrant*, 367 U.S. 717 cited by petitioner is wholly inapplicable. There is a sensible distinction between giving discretion to law enforcement officials to seize allegedly obscene material, and the testimony of a police officer about what constitutes bolita tickets, or bolita "lists", as we have already seen.

Fourth Question Presented

"Whether the interpretation of Title 34 L.P.R.A., Sec. 3, by the Supreme Court of Puerto Rico with reference to the verification of informations by sworn statements is patently erroneous and contravenes the due process provision of the United States and Puerto Rican Constitutions."

Section 3 of Title 34 L.P.R.A. prescribes:

> "Every offense of which the Superior Court has original jurisdiction must be prosecuted by information filed by the prosecuting attorney, in open court, verified by his affidavit, which shall be sufficient if it states that the information is based upon the testimony of witnesses, sworn before him, or upon the testimony of witnesses taken before an examining magistrate and that he solemnly believes that there is just cause

for filing the information." Code Crim. Proc., 1935, 3; July 24, 1952, No. 11, p. 30 eff. July 25, 1952.

In the case at bar the informations were filed, subscribed and verified by district attorney Agustin Mangual Hernandez, even though they were based or supported on the testimony of witnesses examined under oath before district attorney Luis A. Limeres.

Defendant contended before the lower courts — both in the Superior Court as in the Supreme Court of Puerto Rico — that the informations should have been dismissed because they violate the afore-quoted provisions of the Code of Criminal Procedure (34 L.P.R.A. Sec. 3).

The Superior Court of Puerto Rico, Mayaguez section, overruled defendant's motion to dismiss the informations, and the Supreme Court of Puerto Rico, passing upon the question on appeal upheld the ruling of the lower court.

The court below, after making a succinct analysis of the historical backgrounds of said section 3, expressed that, "what is really of importance is that the information be supported by sworn statements, but it is not essential that the statement be sworn before the same district attorney who in turn files and swears the information" (R. 35).

The Supreme Court of Puerto Rico ruled that "Appellant's contention relies exclusively on a literal and forced interpretation of the legal text, which we feel constrained to reject because it leads to a result not intended by the legislature". (R. 35) It also decided that, "as correctly suggested by the Solicitor General in his brief filed before this court the 'prosecuting attorney' in said section refers to the generic concept of 'representative of the state' (R. 35).

In his brief petitioner challenges the holding of the Supreme Court of Puerto Rico, and to support his position alleges that "The protection afforded citizens by these

statutes (against arbitrary prosecution) is lost under the view adopted by the Supreme Court of Puerto Rico as to the requirements of the statutes. This violates fundamental principles of due process and is therefore patently erroneous."

No attempts have been made by petitioner to support his contentions either with cases or with any other authorities. We are firmly convinced that the reasoning and the holdings of the Supreme Court of Puerto Rico are fundamentally sound, and since they are self-explanatory we shall refrain from unnecessary discussions concerning them.

We submit that it is only where the issuance of a warrant of arrest is sought upon a mere information alone that there must be a strict compliance with the provisions of section 3 of the Code of Criminal Procedure of Puerto Rico. However, when the information is not intended to serve as a basis for the issuance of a warrant of arrest, but to be used only as the formal accusation of a crime, a verification is not necessary to sustain the validity of the information as such. *See People* v. *Ortiz*, 76 P.R.R. 241 (1954); *People* v. *Quiñones*, 76 P.R.R. 894 (1954); *People* v. *Superior Court*, 75 P.R.R. 501 (1953); *Lopez* v. *Superior Court*, 79 P.R.R. 470, 474-75.

It has been held that under a constitutional provision prescribing that no warrant shall issue for the arrest of an accused without probable cause supported by oath or affirmation, an information which is made to serve as the basis for the issuance of a warrant must be verified. The only purpose served by the oath, in such a case, however, is to furnish authority for the issuance of the warrant of arrest of an accused, and the oath is not necessary to sustain the information as such, since an unverified information is good for all purposes, except to be used as a basis for issuing a warrant of arrest. Such provisions do not require that an information be verified or supported by

an affidavit showing probable cause in cases where same is used simply to accuse one of a crime and is not used as the basis for the issuance of a warrant of arrest. *Albrecht* v. *United States*, 273 U.S. 1, 6-7; 71 L. ed. 505 and authorities cited therein. *Weeks* v. *United States*, 216 F. 292, certiorari denied in 235 U.S. 697.

We submit that what has been stated above is enough to dispose of the constitutional question raised by petitioner.

But we submit also that the question presented by petitioner is one involving exclusively the interpretation of a local statute.

It is well settled that although the district attorneys are no longer magistrates—after the enactment of the Constitution of the Commonwealth of Puerto Rico—and that they have been deprived of their powers to issue warrants of arrest and to fix bails, they may still subpoena witnesses, take their testimony under oath, and file informations based thereon. *People* v. *Fournier*, 77 P.R.R. 208, 240 (1954); *People* v. *Ortiz*, *supra*; *People* v. *Quinones*, *supra*; *People* v. *Superior Court*, *supra*. District attorneys still have power to determine the existence of probable cause to file informations and the determination of the existence of probable cause for such purpose is not a judicial function. See, *People* v. *Ortiz*, *supra*, page 896. It is not necessary for the district attorney, in any case, to obtain leave of court prior to filing an information.

Before the promulgation of the Constitution of the Commonwealth of Puerto Rico and according to Article 73 of the Code of Criminal Procedure of Puerto Rico, it was the law that "If the facts as stated in the information constitute an offense triable by the court, the court must direct the clerk to issue a bench warrant for the defendant". But this section has been repealed *ipso jure* by the provisions contained in the third paragraph of section 10, Article II.

of our constitution,[7] relative to the issuance of warrants for arrest. It was so decided in the case of *People v. Superior Court*, 75 P.R.R. 501 (1953).

In the aforecited case of *People v. Superior Court* it was also decided that section 74 of the Code of Criminal Procedure of Puerto Rico,[8] as amended by Act No. 22 of 1952, must be harmonized with the intent of the legislature in amending all the other sections of the Code to which reference is made therein, and which were amended to deprive prosecuting attorneys of the power, vested in them, prior to those amendments, to order the arrest of persons charged with an offense, to fix and admit bail, and to issue warrants of arrest. Thereafter, if the prosecuting attorney files an information in court, the judge is not automatically bound to direct the issuance of a bench warrant. In order to do so he must determine first, as in cases where no information has been filed, the existence of probable cause.[9]

Since, as a consequence of the approval of the Puerto Rican constitution, the district attorney cannot issue warrants of arrest anymore, neither fix and admit bail, the filing by him of an information may not be intended anymore to serve as a basis for the issuance of a warrant of

[7] Section 10 of Article II of the Constitution of the Commonwealth of Puerto Rico, in its pertinent part read as follows:

"No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized."

[8] Article 74 of the Code of Criminal Procedure of Puerto Rico provides: "The clerk shall, on the order of a judge of the court, whether the court be in session or not, issue a bench warrant under his signature and the seal of the court for the arrest of the defendant as a result of the filing of the information." 34 L.P.R.A. Section 129.

[9] All these points were discussed and considered in *Rivera Escalera v. Delgado*, 80 P.R.R. 800 (1960), affirmed by this Court in 282 F.2d 335, cert. den. 365 U.S. 883.

arrest and, therefore, any verification thereof has become substantially unnecessary, even though its requirement might have been Preserved in the Code as a formal one. Moreover, since in this jurisdiction the prosecuting attorney may determine by himself whether or not probable cause exists to file an information, and he does not have to obtain leave of court prior to filing one, its verification further becomes unnecessary and unjustifiable, making up the requirement a futile act which would serve no practical purposes. The situation would be wholly different, as shown above, where the information seeks to serve as a basis for a warrant of arrest, and in this latter case, provisions like those of section 3 of the Code of Criminal Procedure would have to be strictly complied with.

With respect to the former situation, as the Supreme Court of Puerto Rico expressed in the above cited case of *People* v. *Ortiz*, even if the information be filed on the sole determination of a prosecuting attorney, there is always the guarantee of subsequent judicial proceedings before a citizen is deprived of his liberty.

Assuming, without accepting it, and for the sake of argument only, that all informations must be verified irrespective of whether they are or not intended to serve as a basis for the issuance of a warrant of arrest, we maintain that the informations filed in the case at bar, substantially complied with the provisions of section 3 of Title 34 L.P.R.A. As we have stated before, the construction given by the Supreme Court of Puerto Rico to said statutory provisions is unquestionably sound, and since the opinion is self-explanatory, we shall not engage in unnecessary repetitions in this brief.

It is significant that petitioner does not question the sufficiency of the informations as such. It is likewise significant that there is no doubt as to the fact that the in

formations were supported by sworn statements.[1] Petitioner does not offer any valid argument to refute the Supreme Court statements as to the nature and scope and meaning of the term of "the Prosecuting Attorney", as used in said section 3. It must be recalled that it was held that the statutory name "the Prosecuting Attorney" refers to the generic concept of "representative of the state".

It is not disputed either that the informations in this case fulfill the requirements of sections 126 and 127 of Title 34 L.P.R.A. It is also patent that they are drafted in such a way that any person of ordinary intelligence may understand what they mean. They also contain all the elements of the offense sought to be charged and sufficiently informed the defendant of the nature of the charges he should be prepared to face. The alleged in connection with the offense of which he was accused were clearly and distinctly set forth in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what was intended.

Under the circumstances set forth in the preceding paragraphs, we do not believe that defendant's right were impaired or that he has suffered any harm. There has been a substantial compliance with the statutory provisions which govern the filing of informations in Puerto Rico. That is all that is required. The existence of a defect, if any, in the filing of the informations in the instant case, is merely of form, and not of substance.

We contend, also, that the motions of petitioner to dismiss the informations in the instant case were properly overruled by the courts below. The reasons therefor will be hereinafter shown.

Pursuant to the provisions of Article 145 of the Code of Criminal Procedure of Puerto Rico (34 L.P.R.A., Sec. 331)

[1] In other words, the allegation set forth in the informations were based upon facts which had been sworn to as true.

only those information charging a felony and that are not subscribed and sworn to by the prosecuting officer, must be set aside by the court, upon defendant's motion, if made at the time of the arraignment.

A mere reading of the aforementioned article of the Code of Criminal Procedure of Puerto Rico is sufficient to convince anyone that those informations charging a misdemeanor are not susceptible of being set aside upon the grounds adduced by petitioner, whether in the lower courts or before this Hon. Court.

There can be no doubt that the crime established and punished by Section 4 of Act No. 220 of 1948 (Bolita Law) is a misdemeanor. According to the provisions of said Section 4, any person convicted of a violation thereof shall be punished by imprisonment in jail for a term of not less than six months (6) or more than two (2) years (33 L.P.R.A., Section 1250).[11]

Article 14 of the Penal Code of Puerto Rico provides:

> "A felony is a crime which is punishable with death, or by imprisonment in the penitentiary. Every other crime is a misdemeanor. When a crime punishable by imprisonment in the penitentiary is also punishable by fine or imprisonment in jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment imposing a punishment other than imprisonment in the penitentiary." (33 L.P.R.A, Sec. 35).

It is obvious, from the above quoted article, that any crime which is not punishable by imprisonment in the peni-

[11] It must be observed that a felony is also established for subsequent violations of Section 4 of the "Bolita Law", but not for the first offense.

tentiary, is a misdemeanor. As we have shown before, section 4 of the "Bolita Law" establishes a punishment by imprisonment in jail for any infringement thereof. Consequently, petitioner is precluded from asking for the dismissal or for the setting aside the information in the instant case, in which a misdemeanor, and not a felony, is involved.

In conclusion, the opinion of the United States Court of Appeals for the First Circuit, deciding that the appeal from the judgment of the Supreme Court of Puerto Rico, presented no substantial question of constitutional right nor serious question of interpretation of local law, is patently correct.

Petitioner has failed to demonstrate that the opinion of the Court below is in conflict with the decision of another court of appeals, on the same matter, or has decided an important question of federal law which has not been, but should be settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this Hon. Court. There is no reason to call for an exercise of this Hon. Court powers of supervision.

Prayer

Wherefor respondent prays that the petition for a writ of certiorari be denied.

Respectfully submitted,

J. B. Fernandez Babilo
Counsel for Respondent
Jorge Segarra Olivero
Assistant Solicitor General

APPENDIX

CONSTITUTION OF THE UNITED STATES
FOURTH AMENDMENT

"The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

CONSTITUTION OF THE COMMONWEALTH OF PUERTO RICO
ARTICLE II, SECTION 10

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated.

Wire-tapping is prohibited.

No warrant for arrest or search and seizure shall issue except by judicial authority and only upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons to be arrested or the things to be seized.

Evidence obtained in violation of this section shall be inadmissible in the courts."

ACT NO. 220 OF MAY 5, 1948 SECTION 4
(33 L.P.R.A., SECTION 1250)

"Any person caught carrying or transporting or who has in his possession for any reason any *papeleta, billete, ticket*, notebook, list of numbers or letters, slips, or implements which can be used for the unlawful games of *bolita, bolipool*, combinations connected with the pools or *bancas* of the racetracks of Puerto Rico, and clandestine lotteries, and any person who possesses, sells, or in any way transports these or any other similar ones which may be utilized

or used in said unlawful games or contests with the practice thereof, shall be guilty of a public offense and shall be immediately arrested and the case shall be brought without delay before the prosecuting attorney having jurisdiction on the matter, who shall file the proper information. Such person shall, upon conviction, be punished by imprisonment in jail for a term of not less than six (6) months or more than two (2) years, and for the second and subsequent violations, shall be punished by imprisonment in the Penitentiary for not less than one (1) year nor more than ten (10) years. *Provided*, That all trials for violations of the provisions of sections 1247-1257 of this title shall be heard in the Superior Court by the court without a jury, exclusively, and the judges of the Superior Court of Puerto Rico are hereby directed to give preference to the hearing of all cases involving a violation of any of the provisions of sections 1247-1257 of this title."

CODE OF CRIMINAL PROCEDURE OF PUERTO RICO

SECTION 3

(34 L.P.R.A. 3)

"Every offense of which the Superior Court has original jurisdiction must be prosecuted by information filed by the prosecuting attorney, in open court, verified, by his affidavit, which shall be sufficient if it states that the information is based upon the testimony of witnesses sworn before him, or upon the testimony of witnesses taken before an examining magistrate, and that he solemnly believes that there is just cause for filing the information."

SECTION 78

(34 L.P.R.A. 128)

"If the facts as stated in the information constitute an offense triable by the court, the court must direct the clerk to issue a bench warrant for the defendant."

SECTION 71
(34 L.P.R.A., 126)

"The information must contain:

1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties.

2. As statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

SECTION 82
(34 L.P.R.A., 137)

"The information is sufficient if it can be understood therefrom:

1 That it is entitled in a court having authority to receive it, though the name of the court be not stated.

2. That the information be subscribed and presented to the court by the prosecuting attorney of the district in which the court is held.

3. That the defendant is named, or if his name can not be discovered, that he is described by a fictitious name, with a statement that his true name is to the prosecuting attorney unknown.

4. That the offense was committed at some place within the jurisdiction of the court, except where the act, though done without the local jurisdiction of the court, is triable therein.

5. That the offense was committed at some time prior to the time of filing the information.

6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

"7. That the act or omission charged as the offense, is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case."

SECTION 145
(34 L.P.R.A., 334)

"An information charging a felony, not subscribed and sworn to by the prosecuting officer, must be set aside by the court, upon the defendant's motion, made at the time he is arraigned."

SECTION 448
(34 L.P.R.A., 1631)

"The court, unless good cause to the contrary is shown, shall order the prosecution to be dismissed in the following cases:

1. Where a person has been held to answer for a public offense, if an information is not filed against him within sixty days thereafter;

2. If a defendant, whose trial has not been postponed upon his application is not brought to trial within one hundred and twenty days after the filing of the information."

CODE OF CIVIL PROCEDURE
SECTION 380
(32 L.P.R.A., 1661)

"The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason."

PENAL CODE OF PUERTO RICO

SECTION 79

(33 L.P.R.A., 233)

"The prosecution for any misdemeanor must be commenced within one year after its commission, except in cases of violation of the Internal-Revenue Laws, when prosecution may be commenced within three years after their commission."